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No. 85-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF COLORADO, *Petitioner*,

v.

STEVEN LEE BERTINE, *Respondent*.

On Writ Of Certiorari To
The Supreme Court Of Colorado

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the discretionary and pretextual inventory search of luggage is an unreasonable search and seizure under the Fourth Amendment?

2. Whether the routine field inventory search of luggage is justified, necessary and reasonable under the Fourth Amendment?

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PERTINENT STATE COURT PROCEEDINGS

The Respondent adopts the Petitioner's statement of the state court proceedings with the following additions and corrections.

The Respondent's motion to suppress evidence alleged that search of the van was not pursuant to a valid inventory search; that the search of the closed backpack and other containers exceeded the scope of a valid inventory search, citing *People* v. *Counterman*, 556 P.2d 481 (1976); that the search and seizure was in violation of Colorado Revised Statutes § 16-3-101 et seq.; Rule 41 of the Colorado Rules of Criminal Procedure; article II, section 7 of the Colorado Constitution; and the Fourth and Fourteenth Amendments of the United States Constitution. (J.A. 1-3).

On July, 1984, the People filed a Notice of Interlocutory Appeal with the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1(a)[1] The only appealable issue at this stage of the pre-trial state court proceedings was the trial court's order *granting* the defendant's motion to suppress in reliance upon article II, section 7 of the Colorado Constitution and Colorado case law. (J.A. 31, 39, 75, 83, 88). The trial court had *denied* defendant's motion to suppress based upon the Fourth and Fourteenth Amendments of the Constitution of the United States on the authority of *Illinois* v. *Lafayette*, 462 U.S. 640 (1983) (J.A. 83). This ruling was nonreviewable on

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[1] Rule 4.1 Interlocutory appeals in Criminal Cases. (a) Grounds. "The State may file an interlocutory appeal in the supreme court from a ruling of a district court granting a motion made in advance of trial by the defendant . . . to suppress evidence . . . provided that the state certifies to the judge who granted such motion that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

interlocutory appeal. Nor were the other trial court's rulings adverse to defendant's position interlocutorily reviewable; i.e., compliance with standard impound/ inventory procedure, pretextual investigatory search.[2]

The questions presented in the prosecutor's brief to the Colorado Supreme Court on interlocutory appeal were as follows:

1. Did the search of the backpack violate the Fourth Amendment to the United States Constitution?[3]

2. Should article II, section 7 of the Colorado Constitution be interpreted consistent with the Fourth Amendment to the United States Constitution with respect to inventory searches of closed containers?

3. Did the search of the backpack violate article II, section 7 of the Colorado Constitution, as that provision has been interpreted in recent decisions of this Court?

4. Assuming, *arguendo*, that this Court upholds the trial court's finding of a violation of the Colorado Constitution, should the remedy be suppression on the evidence found in the backpack?[4]

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[2] See footnote 1, *supra; People* v. *Weeams*, 665 P.2d 619, 623 (Colo. 1983) (defendant not entitled to interlocutory review of issues under Colorado Appellate Rule 4.1(a)).

[3] As noted in footnote 2 *supra* this was a nonreviewable issue on this interlocutory appeal because the trial court had agreed with the prosecution's position at the trial court level and denied the motion to suppress evidence on Fourth Amendment grounds. The Colorado Supreme Court's discussion of *Lafayette* is therefore advisory dicta.

[4] Here the prosecution raised the Colorado statutory good faith exception to the exclusionary rule, C.R.S. § 16-3-308. The Colorado Supreme Court did not mention or rule upon this issue in its opinion.

On September 30, 1985, a majority of the Colorado Supreme Court, in an opinion by Justice William Erickson,[5] affirmed the trial court's order granting the defense motion to suppress the evidence seized from the defendant's backpack. (J.A. 51). The trial court ruling, as previously noted, was grounded solely on article II, section 7 of the Colorado Constitution. Contrary to the statement in Petitioner's brief at 11, the Colorado Supreme Court did *not* base its decision squarely and *solely* on the Fourth Amendment and thereby avoid reaching the issue of the protections afforded by the Colorado Constitution.

The State supreme court stated:

> In the present case, although the district court suppressed the evidence on state constitutional grounds, the court concluded that the inventory search of defendant's rights under the United States Constitution. The [trial] court reasoned that *Illinois* v. *Lafayette*, 462 U.S. at 640 . . . rejected our fourth amendment analysis in *Counterman*. We disagree. 706 P.2d at 416.

The Court presents an extensive analysis of *Lafayette* as applied to the facts of this case and concludes:

> "[O]ur decision in *Counterman* is dispositive of the issues raised in this appeal. We therefore affirm the trial court's order suppressing the evidence. Because we view the search here as violative of fourth amendment protections, we need *not* decide whether article II, section 7 of the Colorado Constitution provides citizens of this state with *greater* protections than the United States Constitution in the area of automobile inventory searches.
>
> The trial court's suppression order is therefore affirmed. (Emphasis added.)

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[5] *People* v. *Bertine*, 706 P.2d 411 (Colo. 1985).

706 P.2d at 419.

The majority opinion interprets the state constitution *at least coextensively* with their interpretation of the Fourth Amendment. The Colorado supreme court never reached the only issue properly before it on the interlocutory appeal—the trial court's ruling that the inventory search violated the higher standard provided by article II, section 7 of the Colorado Constitutions for inventory searches. This issue awaits the state court and Petitioner upon any vacation of the decision of the lower court.

The factual situation in this case is therefore more complex, more contested, and less resolved by the lower court than indicated by Petitioner in his statement of facts. Many of the factual issues raised in respondent's motion to suppress were not addressed by the state supreme court because of the limited interlocutory nature of the prosecution's appeal (not allowing review of issues decided adverse to the defendant) or because the court's ruling made the consideration of those additional issues unnecessary.

STATEMENT

The Statement of the Case in Petitioner's brief contains inaccuracies and also omits facts which are material to the consideration of the questions presented.

The testimony at the suppression hearing showed that on February 10, 1984, at approximately 12:50 a.m., Mr. Bertine was driving south on Broadway Avenue which borders the University of Colorado campus. Officer Julius Toporek (Toporek) observed Bertine's 1957 panel truck speeding and changing lanes without signalling. (J.A. 6-8). Toporek followed the van and estimated the truck's

speed at fifty to fifty-five miles per hour. Toporek turned on his overhead lights and stopped Bertine near the intersection of two major avenues at the corner of the campus. Toporek approached the van and asked the driver, Steven Lee Bertine, for his driver's license and registration, which he produced. Mr. Bertine's appearance was described as shoulder length hair and full beard. (R. 51). His dog was the only other occupant in the vehicle. Boulder is a city with a large university student population. (J.A. 26). In talking to Bertine, Toporek detected a strong order of an alcoholic beverage on his breath.

After Toporek obtained the information from Bertine's driver's license, he notified the Boulder Police communications center by radio that he had stopped a possibly intoxicated driver. (R. 10). Officer Reichenbach (Reichenbach) was dispatched to the scene as a back-up patrol unit. (R. 10). Officer Reichenbach was a Drug Enforcement Administration trained narcotics officer. (J.A. 34).

Toporek returned to the truck and asked Bertine to step from the van and perform a series of roadside sobriety tests. Bertine complied with the request and began the roadside test. Bertine did not have any trouble understanding or responding to Toporek's instructions and questions. (R. 49, 130-131). He was cooperative. (J.A. 46). Reichenbach arrived just after Bertine had started the roadside tests. (J.A. 14).

Toporek concluded, based on his observations, that Bertine was intoxicated and advised him that he was under arrest for driving under the influence. After taking Bertine into custody, handcuffing him, and placing him in the front seat of his patrol car, Toporek asked Reichenbach to impound the truck. Toporek had not discussed the impoundment with Bertine. He did not ask Bertine if he

wanted to contact a third party to take custody of his truck and dog, nor give Bertine any options rather than having the truck towed. Bertine was also not asked if he would waive any police liability in lieu of an inventory. (J.A. 75). Bertine was not asked if he wanted his truck inventoried (J.A. 50). Reichenbach had no conversation with Bertine at all. (R. 42). An animal control unit removed Bertine's dog before Reichenbach entered the truck.

Officer Reichenbach testified that the first thing he does when he inventories a vehicle is "just look around throughout the vehicle to see if there is anything obvious that needs my attention." (R. 43). After quickly looking in the glove box, Reichenbach found a closed brown backpack directly behind the front bench seat in the middle of the vehicle. (J.A. 24, R. 43). He removed the backpack from the truck, took it back to his patrol vehicle, and began to search it. (R. 43).

The officer first unzipped the main compartment of the pack where he found, among other things, a separate opaque tan zippered closed nylon bag. (J.A. 32). He then unzipped this smaller nylon bag and found three opaque clip-locked, rectangular tin cannisters and a small "Irish Mocha Mint" coffee can with a plastic cover. The officer opened the double clip locks on the tin cannisters and found the contraband in issue. He also opened the coffee can and found additional contraband.

When Reichenbach began his search of the backpack, he knew Mr. Bertine's wallet was still on the front seat of the truck (R. 39), and he admitted that there was nothing suspicious about the backpack. (J.A. 47). Reichenback knew the average person on the street in Boulder carries personal items in backpacks (J.A. 26), but he also testified

that out of the thirty (30) to fifty (50) backpacks that he had searched as a police officer in Boulder, as many as twenty (20) to twenty-five (25) of them had contained controlled substances or drugs. (J.A. 47).

After searching the backpack, he went back up to the truck and "inventoried" the rest of the vehicle. (R. 45, J.A. 53). The tow truck was not called until after the "inventory" of the truck was started. (R. 70). He looked for any obvious damage on the outside of the truck (R. 45) and could see jumper cables, blankets, a sand bag, tire and shovel from outside the truck looking in. (R. 45). These items were listed on the impound sheet. (J.A. 53).

After the inventory search was completed, the van was released to a private tow truck company for removal to its private vehicle storage lot.

On cross-examination, Reichenbach testified that nothing about the backpack made him suspect it contained anything of significant value. (J.A. 49). The backpack, zippered pouch, cannisters and coffee can could have been sealed with evidence tape and stored until released to Bertine. (J.A. 48-49, 54, R. 64, 67). When the tin cannisters were removed from the nylon pouch, the tops were securely fastened with a clip on each end. (J.A. 34). Nothing indicated that they contained anything valuable or dangerous. (J.A. 54). Reichenbach had never seen tin cannisters like that before and he became "somewhat curious" about what was inside. (J.A. 65).

Although Reichenbach stated that he would have looked under the driver's seat during an inventory, he did not list a hydraulic jack (worth $30.00), a tripod jack, tire iron, or tire chains (worth $70.00), which were located there. (R. 62, 113). He did not remember those items being there. (R. 62). Reichenbach did not list the contents

of the glove compartment and could not recall anything "unusual" or "of significance" being there other than some papers. (R. 43, 63). When Bertine recovered the truck, the glove compartment papers were in complete disarray (R. 99), and an A.C. electrical converter (worth $25.00) was still in the glove compartment (R. 100). It was the largest item in the glove compartment and would have been impossible to overlook. (R. 100).

Bertine's wallet, left on the front seat, was searched but not inventoried before being placed into the defendant's property at the jail. (R. 41). Reichenbach couldn't remember whether or not the wallet contained credit cards and admitted that if a later claim had been made, he would not have known what had actually been in it at the time it was searched other than the $150.00 in currency which as placed into the property storage facility as evidence. (R. 41, 21).

A sealed white envelope marked "Rent" was found in the front zipped pocket of the backpack. It was torn open "because it felt like cash," but was never entered on the property or impound report. The $210.00 was mentioned only in the incident narrative report. (J.A. 41-42).

The written Boulder Police Department general procedures regarding motor vehicle impounds were admitted into evidence (J.A. 89-95). The testimony of the officers showed that the Boulder Police do not impound every car from which a custodial arrest of the driver is made (J.A. 51). Pursuant to Section III of the impound procedures, the car can be left legally parked on the street with the owner's consent, or released to a responsible third party (J.A. 51, 95). There is no distinction between an alcohol-related arrest and any other custodial traffic arrest, and the Boulder police do not impound every car in which a

drunk driver is arrested (J.A. 51, 59). The procedures allow an arrestee's car to be removed to any public parking area and left under a "park and lock" procedure. Such an area existed at the intersection where Bertine was stopped (J.A. 43). This procedure is sometimes used (J.A. 51). An inventory under a "park and lock" procedure *prohibits* the opening and search of closed containers that give no indication of containing either valuables or a weapon (J.A. 92, 61), while an *impound* of the vehicle requires a detailed vehicle inspection and inventory (J.A. 90). Reichenbach testified that he was familiar with the vehicle impound general order, and that he made "his own discretionary decision" not to move Bertine's car to the nearby public parking lot (J.A. 63-64). It is the individual officer's discretion whether to impound or park and lock (J.A. 60).

Even if an inventory is done, the officer has discretion about what items to inventory (R. 144). Toporek testified that the inventory and search of closed containers would "depend on the circumstances," and the officer's "individual preference" or "whatever arouses his suspicions as far as what may be contained in any type of vehicle." (J.A. 74, 87). Reichenbach would never search the trunk of a car without a search warrant (J.A. 44-45). Toporek would open the trunk "to see if anything of value needed to be listed" on the inventory (R. 144).

Bertine's truck was towed to a lighted private storage lot with a locked six-foot fence on the property of a local Ford dealership. (J.A. 69-70). The lot is patrolled by private security officers and police and nothing had ever been stolen out of a vehicle stored in the lot (J.A. 70, 71). Vehicles have been towed and stored with the doors tape sealed (J.A. 68) and once the transmission is in neutral, access to the interior is unnecessary for towing and storage (J.A. 67-68). In cost Mr. Bertine $34.00 for the tow and

storage of his truck and $24.00 to get his dog released from the pound. (R. 110).

SUMMARY OF THE ARGUMENT

I. The inventory exception rationale is based upon the non-investigatory and non-discretionary nature of the search. In this case, there is evidence that the search was not routine and had an investigative intent and therefore was not a valid inventory.

II. The Fourth Amendment normally requires a warrant to be issued before the instigation of a search. The warrant must be based upon probable cause. Searches not complying with the warrant requirement are invalid and any evidence seized during such a search is subject to exclusion. However, there are exceptions to the warrant requirement.

The constitutionality of these exceptions is based on the reasonableness of the search. Reasonableness is determined through balancing the individual's privacy interests against the governmental interests in the intrusion.

Although there are exceptions, an automobile inventory search is not one that would allow the warrantless search of luggage or a closed container found in an automobile.

This Court, in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) and *United States* v. *Chadwick*, 433 U.S. 1 (1977), recognized that luggage, as repositories of personal effects, was not subject to the automobile exception to the warrant requirement.

In *Sanders*, the Court held that luggage was not subject to a search merely because it was found in a moving automobile. The Court reasoned that there was no more

compelling interest to search luggage taken from an automobile than from any place else.

The *Chadwick* Court first enunciated the principle that luggage was not subject to a search due to its nature. In *Chadwick* it was argued that the privacy interests in luggage were similar to that in an automobile. This reasoning was rejected, as luggage once seized is not mobile and luggage does not have a diminished expectation of privacy like an automobile.

The Court in *Sanders* concluded that if a search of luggage found in an automobile was to be justified without a warrant, some exception other than that applying to automobiles must be utilized.

The petitioner attempts to justify the warrantless search of respondent's backpack under the inventory exception to the warrant requirement under *South Dakota* v. *Opperman*, 428 U.S. 364 (1978) and *Illinois* v. *Lafayette*, 462 U.S. 640 (1983).

Although this Court has recognized an automobile inventory search in *Opperman* and a preincarceration stationhouse inventory search in *Lafayette* to be exceptions to the warrant requirement, neither of these exceptions are applicable to the case at bar.

III. The inventory of Bertine's backpack was unreasonable since the interests advanced to justify it were outweighed by his privacy interests in the luggage. *Opperman*. Although *Opperman* upheld the inventory search of a car, it did not authorize an inventory of a repository of personal effects. In *Opperman* the Court held that a routine automobile inventory, found by lower courts to be essential to perform caretaking functions, was reasonable.

Implicit in *Opperman*, however, is a limitation: an inventory must be reasonable in scope. Consequently, many of the courts considering inventories of containers have employed this same analysis in finding such searches unreasonable in scope. There is a greater expectation of privacy in a container than in an automobile and such expectation is not reduced by the location of the container. Furthermore, safeguarding a backpack presents none of the substantial burdens involved in caretaking automobiles. *Arkansas* v. *Sanders*, 442 U.S. 753 (1977). Courts have thus found virtually no need for the inventories since the containers can be sealed, secured and inventoried as a unit.

The petitioner urges that *Opperman* be extended to authorize luggage inventories, relying on four interests purportedly necessitating them: safeguarding the property, protecting the police from claims of lost or stolen property, preventing harm to police, and ascertaining or verifying identity. Sealing, securing and inventorying containers as a unit adequately serve the first three interests. Thieves or vandals can have no access to the locked property. Similarly, inventorying containers without opening them actually minimizes property claims since the contents will never have been touched by police. The fourth interest, the need to ascertain identity, is generally served by merely asking for identification.

In this case there was no need to inventory the contents of the luggage. Officer Reichenbach concluded that no danger existed and the contents could easily have been safeguarded by sealing the backpack. Other facts suggesting the inventory was unreasonable were the failures: to seek Bertine's consent, to advise him of the purpose of the inventory, and to permit him to make other arrangements for the caretaking of his truck and belongings.

Therefore, because there was no need to inventory the contents of the backpack in which Bertine has a substantial expectation of privacy, the inventory was unreasonable.

IV. Similarly, the *Lafayette* case is inapposite to the case at bar. The justification for allowing the preincarceration stationhouse invenory search in *Lafayette* was the compelling governmental interests in preventing contraband and dangerous objects into the jail environment. This fundamental governmental interest was viewed by the Court to outweigh the individual's limited privacy interest in articles in his possession at the stationhouse. This Court was emphatic in stressing the limited scope of this case to stationhouse searches incident to incarceration. The obvious problem, therefore, in applying *Lafayette* to the present case is that the search of Mr. Bertine's luggage was not carried out in the stationhouse prior to incarceration. Thus, the compelling governmental interest of *Lafayette* does not exist here.

Since Mr. Bertine's individual privacy interests are not diminished, nor the governmental interests compelling, the rationales of *Opperman* and *Lafayette* are equally inapplicable to the present case.

V. The single familiar standard in the field inventory of luggage and closed containers should be narrowly drawn to protect the substantial privacy interests in these repositories of personal effects. The rule of *Robbins* v. *California* would provide a doctrinal framework for preventing unrestricted, pretextual inventory searches in the field. By prohibiting the opening of luggage and closed containers except when the contents are in plain view or are reasonably believed to be dangerous, the Court will properly balance the privacy interests and legitimate gov-

ernmental interests involved in the field inventory context.

ARGUMENT

I. THE SEARCH OF BERTINE'S BACKPACK WAS NOT A VALID INVENTORY BECAUSE OF ELEMENTS OF NONROUTINE DISCRETION AND INVESTIGATIVE MOTIVE.

The validity of the inventory search of the contents of Steven Bertine's backpack cannot withstand scrutiny under minimal prerequisites of a valid inventory—lack of arbitrary discretion and standardized procedures. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

The facts of this case and the testimony of the two Boulder police officers involved in the seizure and search of the truck, the backpack, and its contents show that the officers had considerable discretion as to whether to initiate an impound or to "park and lock" the truck in a public parking space. (J.A. 60) This discretion regarding impoundment directly affects the permissible scope of the subsequent inventory depending upon which safekeeping procedure is selected.

The lack of investigative motive in the routine inventory search is the crucial factor which saves the search from scrutiny under the warrant clause of the Fourth Amendment. The facts of this case show that the initial investigative motive of the search of the backpack was later justified by a "routine" impoundment and inventory.

A. The Impound/Inventory Procedure Gave Unbridled Discretion As To The Scope Of The Inventory Search.

The individual's expectation of privacy must be protected from "arbitrary invasions solely at the unfettered discretion of officers in the field." *Delaware* v. *Prouse*, 440

U.S. 648 (1979); *Brown* v. *Texas*, 443 U.S. 47 (1979). It is this lack of discretion which saves the routine inventory search from scrutiny under the warrant clause. As Justice Powell explained in *Opperman:*

> The officer [in an inventory search] does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized.
>
> A related purpose of the warrant requirment is to prevent hindsight from affecting the evaluation of the reasonableness of a search . . . In the case of an inventory search conducted in accordance with standard police department procedures, there is no significant danger of hindsight justification. 428 U.S. at 383.

Justice Powell further states:

> More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope. 428 U.S. at 384.

The Solicitor General argues (Brief at 10) that in the case of an inventory search, the officer "does not make a discretionary determination to search," quoting Justice Powell above.

The trial court found that the Boulder police procedure gave *considerable* discretion to the police (J.A. 80). The officers had three alternatives in this case: seize and tow the truck; park and lock the truck in a public parking area; or release the truck to a designated third party. (J.A. 92-94). The regulations also anticipate consultation with

the owner regarding his desires regarding disposition of his property. (J.A. 92-94).[6]

These regulations prohibit the opening and inventory search of closed containers "that give no indication of containing either valuables or a weapon when the vehicle is parked and locked." (J.A. 92-93). A reasonable argument can be made that this language regarding the limited scope of the inventory of closed containers would apply even under the impoundment procedure. *See People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481 (1976). This limiting scope language is a direct quote from the *Counterman* opinion. *Id.* at 485.

The decision to tow or to park and lock is committed totally to the unguided discretion of the individual police officer, (J.A. 63-64).

The only limitation on the *scope* of the resulting inventory is contained under the "park and lock" procedures section which *forbids* the search of closed containers. It is difficult to understand this distinction in the procedures if the same governmental interests of protection from liability and dangerous instrumentalities are actually served in both situations.

The practical effect of this discretionary procedure is to leave the owner of the automobile subject to the unbridled

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[6] Respondent would endorse and incorporate the American Civil Liberties amicus position that any lawful impound or inventory of a citizen's property be *preconditioned* on consultation and consent by the owner when the owner is present. *See*, Appendix A-samples of department regulations.

whim of the officer in the field.[7] This is precisely the discretion to invade private property which this Court has consistently circumscribed by a requirement that an established, standardized police department procedure exist and be followed. *Opperman* at 376; *Lafayette* at 647.

There is no evidence that the police were following a "routine" or "standard" procedure that in any manner limited their discretion to choose the targets of their tow and inventory procedures rather than "park and lock."

The impermissible discretion in the officers' decision to inventory and tow in this case is reflected in Reichenbach's definitional criteria—any vehicle "used in the commission of a crime." *Any* car involved in a traffic offense/arrest situation would quality. (J.A. 59).

The standardization of the process and forms once the decisions to impound/tow has been made does not minimize the risk of arbitrary and discriminatory searches.

"This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979).

In both *Opperman* and *Lafayette*, the decision to inventory was non-discretionary. All abandoned cars were

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[7] As the state court noted: "Although the procedure followed in this case was officially authorized, the officer also had the option of either sealing the vehicle before it was towed away, or driving the vehicle to the nearest lot and locking it. The Boulder Police Department regulations and rules do not require that an automobile be inventoried and searched in accordance with the procedures followed in this case. *People* v. *Bertine*, 706 P.2d at 413.

impounded and inventoried. All arrestee's personal belongings were seized and inventoried. Officer Reichenbach's discretion as to the method of implementation in securing Bertine's truck taints the "routine" nature of the subsequent inventory. *Delaware* v. *Prouse*, *supra*; *Brown* v. *Texas*, 443 U.S. 47 (1977).

B. There Is Evidence Of A Pretextual Inventory Search To Conceal An Investigative Motive.

> If there is some showing that a certain inventory was a subterfuge, as where only suspicious items are scrutinized and the other contents are not removed and inventoried, the evidence must be suppressed. 2. W. Lafave, *Search and Seizure* (1978) (hereinafter LaFave), § 5.5, p. 360.

Despite the trial court's finding to the contrary and the state court's rule of nonreviewability of such rulings against the defendant on an interlocutory appeal, the Court should be reluctant to formulate standards of national impact on such a record.

The trial court found that the inventory of the vehicle was "slip-shod" (J.A. 81). It actually was a "sham." Narcotic officer Reichenbach's clear motive was a search for contraband. As the long-haired, bearded, young Bertine was driven away to the stationhouse, Reichenbach "just looked around" the panel truck to see if there was "anything obvious that need[ed] [his] attention." (R. 43). After rummaging through the personal papers in the glove compartment (but failing to list or remove the electrical converter), his attention turned immediately to the backpack behind the front seat. (J.A. 24, R. 43). Reichenbach removed the backpack from the truck and took it back to his patrol car for the thorough inspection. (R. 43). The trial court found that the "inventory listing items in the backpack was done much later by someone else." (J.A.

82). Reichenbach had previous experience with such backpacks and knew his chances were good of locating contraband (J.A. 47). It was only after the complete and probing search of the containers within the backpack and the anticipated discovery of contraband that Reichenbach decided to call the tow truck to justify his inventory (R. 70). The testimony at the suppression hearing was uncontradicted that Reichenback ommitted more items of valuable property in the truck than were included on the impound sheet. (R. 41, 62, 110, 113).

In *State* v. *Gluck*, 83 Wash.2d 424, 518 P.2d 703 (1974), the Court was confronted with just this type of inventory. The evidence was suppressed because the search could not be justified as an inventory, where the officers abandoned the search after finding incriminating evidence and a complete list of other items in the vehicle was *not* made. *See also, United States* v. *Abbott*, 584 F.Supp. 442 (W.D. Pa. 1984); *State* v. *Knight*, 621 P.2d 370 (Hawaii 1980).[8]

The inventory of Bertine's truck was a procedure of unreasonable scope that was a pretext concealing an investigative motive. *Opperman* at 376. This Court should not condone it with its approval.

II. AN AUTOMOBILE INVENTORY SEARCH IS NOT AN EXCEPTION TO THE WARRANT REQUIREMENT WHICH WOULD ALLOW THE WARRANTLESS SEARCH OF LUGGAGE OR A CLOSED CONTAINER FOUND IN AN AUTOMOBILE.

This Court has consistently interpreted the Fourth Amendment of the United States Constitution to require

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[8] *See, State* v. *Miller*, 420 A.2d 181 (Del. Super. 1980); *In the Matter of B.K.C.*, 413 A.2d 894 (D.C. App. 1980); *Miller* v. *State*, 403 So.2d 1307 (Fla. 1981); *Manalansan* v. *State*, 45 Md. App. 667, 415 A.2d 308 (1980); *People* v. *Siegel*, 95 Mich. App. 594, 291 N.W.2d 134 (1980); *State* v. *Peterson*, 583 S.W.2d 277 (Mo. App. 1979); *Thompson* v. *State*, 83 Wis.2d 134, 265 N.W.2d 467 (1978).

that a search of private property be performed pursuant to a search warrant. *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979).

The "warrant requirement" was made fully applicable to the states by the Fourteenth Amendment to the United States Constitution. *Id.* at 758 n.4 (citing *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Wolf* v. *Colorado*, 338 U.S. 25 (1949).)

Further, "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn." *Jones* v. *United States*, 357 U.S. 493, 499 (1958).

The Fourth Amendment itself states the applicable test for a constitutional warrantless search to be one of reasonableness: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." (emphasis added.) This Court has set out guidelines to assist in this determination.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. *Wolfish*, 441 U.S. 520, 559 (1979). This test has been generalized to be a balancing of the individual's privacy interest against the governmental interests in pursuing the search.

The State of Colorado asserts that an inventory search of an automobile by the government is a reasonable exception to the Fourth Amendment warrant requirement. The

State further asserts that this should allow the warrantless search of luggage or a closed container found inside a properly seized automobile.

A. A Search Of Luggage Is Not An Exception To The Warrant Requirement Even When Such Luggage Is Found In An Automobile.

Persons possessing luggage are protected against warrantless searches of this property even when such luggage is found in an automobile. This right exists in spite of the "automobile exception" and is due to the owner's expectation of privacy in the luggage. *Arkansas* v. *Sanders*, 442 U.S. 753 (1979); *United States* v. *Chadwick*, 443 U.S. 1 (1977).

Courts have sustained the constitutionality of warrantless searches of automobiles under the "automobile exception" to the warrant requirement. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925).

Such an exception exists due to the nature of automobiles. Automobiles are mobile and always requiring a warrant for a search might be impracticable. *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976) (citing *Carrol* v. *United States*, 267 U.S. 132 (1925)); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Further, an automobile has a diminished expectation of privacy due to the pervasive governmental regulation, inspection, and possible caretaking of automobiles. *Id.* at 368. Automobile travel is also public.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares

where both its occupants and its contents are in plain view.

Cardwell v. *Lewis*, 417 U.S. 583, 590 (1974). The mere fact, however, that luggage is found within an automobile does not render the luggage subject to a warrantless search under the automobile exception. *Sanders*, 442 U.S. at 753.

In *Sanders*, police received reliable information that the defendant would be carrying contraband in a green suitcase when he arrived at the airport. The defendant did appear carrying the described suitcase. He placed the suitcase in a taxi and then drove off. The police then stopped the taxi and made a warrantless search of the suitcase. Marijuana was found inside. *Id.* at 755.

On appeal to the Arkansas Supreme Court the evidence seized in the search of the suitcase was suppressed. This Court affirmed, stating that it would not allow the search of luggage merely because it was found in an automobile. "Accordingly, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." *Id.* at 764.

Sanders heavily relied on the findings in the case of *United States* v. *Chadwick* 433 U.S. 1 (1977). In *Chadwick*, the reasons for constitutional warrantless searches of cars were compared to that of luggage. The Courts held that luggage is a repository for personal effects, and unlike a car, persons possessing luggage are protected against a warrantless search. *Id.*

Chadwick involved the warrantless search of a footlocker which had been placed in the truck of a car. The police had probable cause to believe that the footlocker contained contraband. This Court upheld the suppression

of the contraband seized in the search, and rejected the reasoning that a search of luggage was like that of a car. Luggage does not have the same mobility as a car:

> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station . . . there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.

Chadwick at 13.

More important to the Court was the fact that luggage is private.

> The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker . . . . Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile. *Id.*

From the preceding decisions it is clear that luggage cannot be searched under the automobile exception or by reasoning that luggage is analogous to an automobile. At the very least, a backpack, such as the one possessed by Mr. Bertine, is a repository of personal effects and fits the analysis under *Chadwick* and *Sanders*.

Therefore, in the case at bar, Mr. Bertine's backpack, sitting behind the seat when the police officer found it, was subject to the rules that had been set out in *Chadwick* and *Sanders*. Namely, that Mr. Bertine was protected against a warrantless search subject to the automobile exception, and that his expectation of privacy concerning the contents of his backpack was not diminished.

In order to search Mr. Bertine's backpack another exception that applies must be found. "Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway." *Sanders*, 442 U.S. at 766. *See also, United States* v. *Place*, 462 U.S. 696, 706-707 (1983) (privacy interest in contents of personal luggage).

Even where exceptions to the warrant requirement have allowed warrantless searches of closed containers found in automobiles, a preliminary showing of probable cause has still been required. *New York* v. *Belton*, 453 U.S. 454 (1981) (search incident to a lawful probable cause arrest of the occupant of an automobile may extend to the contents of any containers found within the passenger compartment of the car); *United States* v. *Ross*, 456 U.S. 798 (1982) (probable cause to search an automobile allows search of any containers found therein). The recent cases of this Court involving searches of containers in automobiles thus indicate that containers found in an automobile may be searched only upon a prior determination of probable cause, either as to the container itself or as to the automobile within which it is located; and unless a recognized exception to the warrant requirement exists, either for searching the container or the car, a warrant must be obtained to search the container.

Thus, while a reasonable automobile inventory search pursuant to established procedures is permissible, the search of any closed containers found therein must be based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant.

III. THE INVENTORY SEARCH OF BERTINE'S BACKPACK WAS UNREASONABLE BECAUSE BERTINE HAD A HIGH EXPECTATION OF PRIVACY IN THE CONTENTS OF THE BAG AND THERE WAS NO NEED FOR THE POLICE TO SEARCH INSIDE IT.

The inventory "search"[9] of the contents of Steven Bertine's backpack cannot withstand scrutiny under the Fourth Amendment standard of reasonableness—the standard which inventory searches must meet. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). Essentially, the test for determining reasonableness involves a balancing of the interests advanced to justify the intrusion against the interest of the individual in the privacy of his effects. *Camara* v. *Municipal Court*, 387 U.S. 523-37 (1967); *Opperman*, 428 U.S. at 377-78 (Powell, J., concurring). In applying this test this Court should examine "all the facts and circumstances of this case in light of the principles set forth in . . . prior decisions." 428 U.S. at 375.

A. Opperman Did Not Authorize Inventory Searches Of The Contents Of Repositories Of Personal Effects, Such As Luggage, In Which There Is A High Expectation Of Privacy.

The Court in *Opperman* found that the inventory search of the contents of a glove compartment in an auto-

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[9] Whether or not an inventory constitutes a "search" for Fourth Amendment purposes would not appear to be a critical question in this case since the state has never argued that the inventory was exempt from the Fourth Amendment standard of reasonableness. *South Dakota* v. *Opperman*, 428 U.S. 364, 371 n.6 (1976). In any event, Bertine's position is that an inventory does constitute a search. *See South Dakota* v. *Opperman*, 428 U.S. at 377 n.1 (Powell, J., concurring); 428 U.S. at 385 n.2 (Marshall, J., dissenting). *See also* 2 W. LaFave, *Search and Seizure* § *5.3*, at 306 & n.23 (1978). The petitioner's and government's briefs concede as much.

mobile which had been lawfully impounded met the reasonableness standard. It must be emphasized, however, that the instant case involves an inventory of a different nature: a search of luggage.

There are fundamental distinctions between automobile and luggage inventories. The expectation of privacy in the contents of luggage, a repository for personal effects, is substantially higher than that in an automobile. As was noted by Justice Powell in a concurring opinion in *Rakes* v. *Illinois*, 439 U.S. 128, 153-54 (1978): "Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations." Moreover, as this Court has recognized, the expectation of privacy in repositories accompanying or being carried by a person at the time of arrest is not reduced by virtue of an arrest. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977); *Arkansas* v. *Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, C.J., concurring).

Not only are the privacy interests distinct, but the need to conduct a search in each type of inventory is different. Unlike the significant burdens and specific problems involved in the caretaking of automobiles, which make an inventory search occasionally necessary, no comparable burdens or problems are involved in safeguarding repositories of personal effects such as backpacks. *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14. Accordingly, there is no need to conduct an inventory of the contents of luggage that can be safely stored.

A close look at *Opperman* demonstrates that its holding is *limited to its facts* and does not authorize the search of repositories of personal effects. In *Opperman*, the Court concluded that routine inventory searches of the contents

of lawfully impounded abandoned automobiles were reasonable. Interests recognized to justify such intrusions included: (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; and (3) protection of the police from potential danger.[10] 428 U.S. at 369. These interests favoring intrusion were found to outweigh the citizen's interest in the privacy of the contents of his automobile, particularly since that privacy interest was recognized to be significantly less than the expectation of privacy associated with one's home. The Court noted that the practice of inventorying the contents of an automobile had been almost uniformly found by the states to be "essential to respond to incidents of theft or vandalism." 428 U.S. at 369.

With respect to the record before it in *Opperman*, the Court upheld the routine inventory search of the contents of a glove compartment. The Court noted that the car had been legally impounded, the owner was not present to make other arrangements for the safekeeping of his belongings, and the routine inventory was prompted by the presence in plain view of certain valuables. 428 U.S. at 375.

The Court also found, in footnote ten, that "[t]he inventory was not unreasonable in scope." 428 U.S. at 376 n.10. The principle implicit in this footnote, that the scope of an inventory search is not unlimited, was addressed as well in the concurring and dissenting opinions. Justice Powell, in a concurring opinion, observed that the Court's holding

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[10] The Court also noted the frequent need to determine whether a vehicle had been stolen and thereafter abandoned. 428 U.S. at 369. This interest does not apply to the inventory of an arrestee's effects and is not presented on the facts or claimed by the state.

provided no general license of the police to examine all the contents of automobiles, such as letters or checkbooks. 428 U.S. at 380 & n.7. Justice Marshall, in a dissenting opinion, agreed with Justice Powell's observation and noted that the Court's opinion did not authorize the search of containers which could be sealed, removed and secured without further intrusion. 428 U.S. at 388 n.6. Consistent with these statements, a large number of courts which have addressed the question have concluded that an inventory search of luggage and other removable containers in a vehicle is unreasonable in scope.[11]

Opperman thus does not authorize the search of contents of repositories such as backpacks.

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[11] *United States* v. *Wilson*, 636 F.2d 116 (8th Cir. 1980); *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979); *State* v. *Prober*, 98 Wis.2d 345, 297 N.W.2d 1, 7 (1980); *United States* v. *Vallieres*, 443 F.Supp. 186, 191 (D.Conn. 1977); *State* v. *Pace*, 171 N.J. Super. 240, 408 A.2d 808, 813 (1979); *State* v. *Houser*, 95 Wash.2d 143, 622 P.2d 1218, 1226-28 (1980); *State* v. *Downes*, 285 Or. 369, 591 P.2d 1352 (1979); *State* v. *Bramlett*, 94 N.M. 263, 609 P.2d 345, 347-48 (Ct.App. 1980); *Obermeyer* v. *State*, 97 Nev. 158, 625 P.2d 95, 96-97 (1981); *Manalansan* v. *State*, 48 Md. App. 667, 415 A.2d 308 (1980); *Smith* v. *State*, 48 Md. App. 425, 427 A.2d 1064, 1065 (1981); *People* v. *Grana*, 185 Colo. 126, 527 P.2d 543, 545 (1974); *State* v. *Keller*, 265 Or. 622, 510 P.2d 568, 570 (1973); *State* v. *McDougal*, 68 Wis.2d 339, 228 N.W.2d 671, 678 (1975); *State* v. *Gwinn*, 301 A.2d 291, 294 (Del. 1972); *People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481, 485 (1976); *People* v. *Miller*, 110 Mich. App. 270, 312 N.W.2d 225, 228 (1981); *State* v. *Roth*, 305 N.W.2d 501 (Iowa 1981), *cert. denied*, 454 U.S. 870 (1981); *People* v. *Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346, 1352 (1980), *cert. denied*, 453 U.S. 923 (1981); *State* v. *Morgan*, 3 Kan. App.2d 667, 671, 600 P.2d 155, 159 (1979); *State* v. *Potter*, 8 Kan. App.2d 52, 648 P.2d 1162, 1165 (1982); *People* v. *Salter*, 91 Ill. App.3d 831, 414 N.E.2d 1252, 1255 (1980); *State* v. *Daniel*, 589 P.2d 408, 417 (Alas. 1979).

B. Opperman's Holding That An Inventory Search Of An Automobile Was Reasonable Should Not Be Extended To Validate An Inventory Of The Contents Of Luggage.

Numerous courts which have considered a search of the contents of an arrestee's repositories of personal effects have found it to be beyond the scope of a permissible inventory.[12] These courts find that there is virtually no need to search the contents of the containers since they can simply be sealed, secured and inventoried as a unit. This caretaking procedure is found to be workable and reasonable by these courts.

The state, nevertheless, urges this Court to extend *Opperman*'s holding to searches of the contents of luggage and other repositories. The various interests that are advocated by the state as grounds for conducting an inventory search of the contents of a repository for personal effects such as a backpack are (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; (3) the need to prevent harm to the police; and (4) the need to ascertain or verify identify.

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[12] *United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1288-90 (9th Cir. 1981); *United States* v. *Schleis*, 582 F.2d 1166, 1172-73 (8th Cir. 1978); *United States* v. *Cooper*, 428 F.Supp. 652, 654-55 (S.D. Ohio), *aff'd*, 564 F.2d 100 (6th Cir. 1977); *United States* v. *Davis*, 501 F.Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981); *State* v. *Kaluna*, 55 Haw. 361, 520 P.2d 51, 60-62 (1974); *Reeves* v. *State*, 599 P.2d 727, 735-36 (Alas. 1979); *Bradford* v. *State*, 401 N.E.2d 77, 80 (Ind. App. 1980); *People* v. *Helm*, 89 Ill.2d 34, 431 N.E.2d 1033, 1034-35 (1981); *Hicks* v. *State*, 398 So.2d 1008, 1010 (Dist. Ct. App. Fla. 1981). *See also United States* v. *Mills*, 472 F.2d 1231, 1240-41 (D.C. Cir. 1972); *People* v. *Hamilton*, 74 Ill.2d 457, 386 N.E.2d 53 (1979).

There is virtually no need, however, for the police to search inside luggage in order to advance these interests. Sealing, securing, and inventorying the bag as a unit achieves the first three interests and the fourth interest—the need to verify identify—in most cases will be advanced by simply asking the arrestee to produce identification as was done in this case.

1. Sealing, Securing And Inventorying A Backpack As A Unit Safeguards The Property, Protects The Police From False Claims, And Protects Police From Dangerous Instrumentalities.

The interests generally recognized to justify an inventory—protection of the owner's property, protection against claims of lost or stolen property, and police safety—are served be sealing, securing, and inventorying the property as a unit. In the first place, sealing, securing and inventorying a container as a unit, without inventorying its contents, safeguards the police from claims or disputes over lost or stolen property. The police are actually less likely to be accused of theft or loss of the contents if the container "has never been opened and its contents have never been removed, reshuffled and replaced." *United States* v. *Bloomfield*, 594 F.2d 1200, 1202 (8th Cir. 1979). As Professor LaFave has noted:

> "False claims cannot be avoided and seem more likely when the contents are handled and inventoried (a time when, the owner might later claim, some of his property was taken), as compared to when the container is immediately sealed." 2 W. LaFave, *Search and Seizure § 5.5*, at 360 n.50 (1978). *See Opperman*, 428 U.S. at 378-79 (Powell, J., concurring); 428 U.S. at 391 (Marshall, Jr., dissenting).

Furthermore, safeguarding property as a unit places no burden on the police. In the first place, the police already

perform similar functions, such as that associated with the caretaking of evidence. Secondly, simply listing "one backpack" on an inventory sheet is less burdensome than listing the pack as well as its contents. *See United States* v. *Hill*, 458 F.Supp. 31, 37 (D.D.C. 1978).

Many of the courts addressing this question thus recognize, as did the state court in this case, that securing containers of personal effects as a unit is better than inventorying the contents of the container.[13] Indeed, as the state court in this case found, there was no need to search inside Bertine's backpack because there was a secure impound lot available. The backpack could also have been secured in the police evidence room.[14]

Moreover, protecting the police from potential booby-traps and explosives would be better accomplished by

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[13] *See, e.g., United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1289 (9th Cir. 1981); *State* v. *Gwinn*, 301 A.2d 291, 294 (De. 1972); *People* v. *Helm*, 89 Ill.2d 34, 431 N.E.2d 1033, 1035 (1981); *State* v. *McDougal*, 68 Wis.2d 399, 228 N.W.2d 671, 678 (1975). *See also* 2. W. LaFave, *Search and Seizure* § 7.4, at 571-72 (1978); Comment, 1968 U. Ill. L.F. 401, 407-08.

[14] The Government in its amicus brief cites *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976), and *Cady* v. *Dombrowski*, 413 U.S. 433, 447, and argues that the reasonableness of an inventory does not depend on whether the police interests in making the intrusion can be accomplished by less intrusive means, such as securing the repository as a unit. A careful reading of the cited case shows that the Court was referring to less intrusive means which were *unreasonable* by virtue of their prohibitive cost or the heavy burden they would involve. This is the precise point recognized in *Opperman*, i.e., that the less intrusive alternative of posting a security guard at the car-impound lot would be prohibitively expensive. 428 U.S. at 379 (Powell, J., concurring). "No comparable burdens are likely to exist with respect to the seizure of personal luggage." *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14.

securing the container as a unit. As one court has noted, it would be foolhardy to blindly and routinely search every container for explosives and booby-traps. *United States* v. *Cooper*, 428 F.Supp. 652, 655 (S.D. Ohio 1977). *See* LaFave, § 5.5, at 360 n.50 (1978); *see also Illinois* v. *Lafayette*, 462 U.S. 640, 649 (Marshall, J., concurring); *Cf. United States* v. *Chadwick*, 433 U.S. 1, 15 (1977); *id.*, at 17, and n.2 (Brennen, J., concurring).

This is not to say that all repositories being inventoried may never be searched to check for explosive devices or dangerous instrumentalities. If the police have reason to believe that a certain repository contains some immediately dangerous instrumentality, then it should be searched in a professional manner. *United States* v. *Chadwick*, 433 U.S. 1, 15 n.9 (1977).

This case, however, does not contain any exigent circumstances. Bertine was arrested for driving under the influence. The arresting officer was not in any fear of his safety and did not find it necessary to even conduct a pat-down search of Bertine.

Accordingly, a search inside the backpack was not needed to safeguard the property, protect the police from false claims, or dangerous instrumentalities since the officer could have simply inventoried the backpack as a unit, sealed it, and secured it in the van or in the police evidence room.

2. Other Considerations In This Case, Including The Absence Of Consent To Search, Military Against Upholding The Stationhouse Inventory.

Additional factors in this case support a finding of unreasonableness. For example, the inventory was conducted without Bertine's consent and he was not advised of the purpose of the inventory. Moreover, he apparently was not given an opportunity to make other arrange-

ments for the safekeeping of his truck and belongings. Furthermore, since Bertine was arrested for a traffic offense, the police would very likely have retained custody of his belongings for only a short period of time until he was able to post a bond. *See United States* v. *Davis*, 501 F.Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981). Even after being arrested for possession of controlled substances, Bertine was released the next afternoon (R. 111).

All of these factors show the search was unreasonable. Certainly, it would have been consistent with Fourth Amendment principles to seek Bertine's consent, and provide him an opportunity to have someone retrieve his truck and belongings.[15] Lower courts recognize that these factors merit great weight and find inventory searches to be unreasonable where the arrestee was not asked for consent or given an opportunity to make other arrangements for the caretaking of his belongs.[16]

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[15] The need for the owner's consent was advocated by the dissent in *Opperman*, but rejected in the opinion of the Court since the lack of consent apparently would not protect the police from claims of lost of stolen property or protect the public from vandals who might obtain a firearm. 428 U.S. at 376 n.10. Unlike automobiles, the backpack can be secured within the confines of the station or a secured storage area and protected from theft, loss and vandals. The consent theory advanced by the dissent in *Opperman* thus merits renewed consideration, under the facts of this case.

[16] *See, e.g., Zehrung* v. *State*, 569 P.2d 189, 193 (Alas. 1977), *modified*, 573 P.2d 858 (1978); *United States* v. *Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980); *State* v. *Killcrease*, 379 So.2d 737 (La. 1980); *State* v. *Hatfield*, 364 So.2d 578 (La. 1978); *State* v. *Schmidt*, 359 So.2d 133 (La. 1978); *State* v. *Mangold*, 82 N.J. 575, 414 A.2d 1312 (1980); *Gaston* v. *State*, 155 Ga.App. 337, 270 S.E.2d 877 (1980); *State* v. *Southwell*, 369 So.2d 371 (Dist. Ct. App. Fla. 1979). *See also*, 2 W. LaFave, *Search and Seizure* § 7.4, at 571 (1978) ("[T]here is much to be said in

In sum, the state's position that *Opperman*'s holding is controlling in this case should be rejected. As Bertine has shown, he had a high privacy interest in the contents of his backpack. Moreover, in contrast to the essential need to conduct automobile inventories, the police had no need to search inside his backpack in order to achieve inventory objectives. The state's position ignores the fundamental distinctions that exist between these two types of inventories. Its argument that *Opperman*'s holding should extend to this case because the search was an "inventory" conducted pursuant to "routine procedure" essentially amounts to an indiscriminate use of labels to avoid a serious constitutional question. Justice Cardozo described this use of labels as follows:

> "A fertile source of perversion in constitutional theory is the tyranny of labels . . . [A] court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1933).

Because Bertine's privacy interest outweighed the need for the intrusion, the search was unreasonable. Consequently, the judgment of the state court should be affirmed.

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favor of the proposition that the police should [conduct an] inventory . . . when the owner . . . is at hand only if he elects that alternative.")

See also, United States v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980); *State* v. *Jewell*, 338 S.2d 633 (La. 1976); *State* v. *Mangold*, 82 N.J. 575, 414 A.2d 1312 (1980); *State* v. *Goff*, 272 W.Va. ____ 272 S.E.2d 457 (1980); *State* v. *McDougal*, 68 Wis.2d 399, 228 N.W.2d 671 (1975).

IV. THE INVENTORY SEARCH UPHELD IN ILLINOIS V. LAFAYETTE WAS A PREINCARCERATION, STATIONHOUSE INVENTORY SEARCH AND IS INAPPLICABLE TO THE SEARCH OF A CLOSED CONTAINER FOUND IN AN AUTOMOBILE.

The holding of *Illinois* v. *Lafayette*, 462 U.S. 640 (1983) is quite specific and limited in scope. "We hold that it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." *Id.* at 648. In such situations the inventory search is restricted to searching the items in the possession of an arrested person while in the stationhouse. The Court was so committed to the limited scope of this decision that it followed the above holding with the following footnote. "The record is unclear as to whether respondent was to have been incarcerated after being booked for disturbing the peace. This is an appropriate inquiry on remand." *Id.* at 648, n.3. Therefore, if on remand it was determined that respondent was not to have been incarcerated, then the search would not have been incident to incarceration and thus unreasonable and invalid.

To the extent that *Lafayette* has any bearing on the present case at all, it is that the Court reaffirms its commitment to the balancing of an individual's privacy interests versus government interests. *Id.* at 2608. In the stationhouse, however, the Court applies this test by noting additional fundamental exigencies in the government's interests. Here, the Court acknowledged a more compelling governmental interest in the stationhouse. "Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weap-

ons—can be concealed in innocent looking articles taken from the arrestee's possession." *Id.* at 646. The need to protect against *such* risks arises independently of even the particular officer's subjective concerns at the moment of the search. *Id.*

In fact, the Court went as far as to say that "the governmental interests underlying a stationhouse search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest. *Id.* at 645. With the governmental interests so strong in a stationhouse setting, it is unlikely that the individual's limited expectation of privacy would ever be great enough to outweigh them; the one possible exception being a strip search, on which the court did not rule. *Id.* at 645.[17]

The petitioner's argument that the holding of *Lafayette* controls in the field inventory context is based on the fallacious conclusion that there are "identical" interests in each situation. This assumption ignores the fundamental principle underlying *Lafayette*—"the *evolution* of interests along the continuum from arrest to incarceration." 462 U.S. at 644.

The scope of the stationhouse search will invariably be more intrusive that that conducted in the field. The exigencies of the context demand it. Conversely, the field inventory search, conducted long after the arrestee has been safely removed from the scene should be much *less* intrusive. The governmental interests are minimal.[18]

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[17] The holding in *Lafayette* does not rely on the search incident to arrest exception to the warrant requirement as Justice Marshall's concurring opinion points out. *Id.* at 2611 (Marshall, J., concurring).

[18] Nor should the Court adopt an "accelerated" inventory search rationale to justify the search of luggage found at the scene of an arrest. *People* v. *Laiwa*, 34 Cal.3d 711, 669 P.2d 1278 (1983).

The petitioner assumes that *Lafayette* has eliminated any necessity of further balancing of the contending interests in different inventory contexts. The resulting equation of the jailhouse inventory with all other types of inventories is blind to the complexity of life within which the Fourth Amendment exists.

The petitioner also argues that the "reasonableness" of Reichenbach's conduct needs no further analysis than that it was permitted under a departmental regulation. The review of the reasonableness of that vague rule allowing "a detailed vehicle inspection and inventory" (J.A. 90) is not to be allowed because to do so would be to "second guess" the police department. *Lafayette* at 648. Thus, the petitioner argues for the Court to simply abdicate its responsibility to enforce the Fourth Amendment by conferring unreviewable authority on the police. *See* Note, *Illinois* v. *Lafayette: has the Fourth Amendment Vanished in the Face of Administrative Expediency?* 21 Cal.W.L.Rev. 218 (1984).

As the state court correctly states:

> [U]nconstitutional searches cannot be constitutionalized by standardizing them as part of normal police practice. Even though routine procedures have been followed, courts should not blind themselves to police practices that sanction an unlimited intrusion into areas where an individual clearly possesses a reasonable expectation of privacy. Simply put, the rights secured by the fourth amendment cannot be eliminated by administrative fiat. (citation omitted.) *Bertine*, 706 P.2d at 419.

This Court's reluctance to become embroiled in administrative procedures ensuring the safety of a jailhouse or a prison should not require abandonment of vigilance for reasonable expectations of privacy in society as a whole.

V. THE SINGLE FAMILIAR STANDARD FOR THE FIELD INVENTORY OF CONTAINERS SHOULD BE NARROWLY DRAWN TO PROTECT SUBSTANTIAL EXPECTATIONS OF PRIVACY.

It may "be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers of items may be . . . sealed as a unit" in certain contexts. *Lafayette* at 648. Certainly in situations such as the potentially volatile booking search within the stationhouse security setting, *Illinois* v. *Lafayette*, 462 U.S. at 648; the probable cause search of a mobile vehicle, *United States* v. *Ross*, 456 U.S. 798, 821 (1982); the search incident to arrest in inherently dangerous, rapidly unfolding street arrest, *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979), the need for "bright lines" and "single familiar standards" are paramount so that it is "possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Belton* at 458.

The "continuum of interests" demands a different analysis in the non-exigent context of the routine field inventory search. The impound officer *can* be expected to exercise a reasonable, ad hoc judgment with respect to the containers, luggage and other repositories of highly personal effects which he may encounter. This is not to say that the Court should not attempt to formulate some standard which is respectful of the substantial expectation of privacy in personal effects protected by the fouth amendment. The "Bertine" rule advocated by the United States Solicitor and the petitioner intrudes too far into these protected interests. Governmental expediency should not allow the "inventory" to become the talisman before which the Fourth Amendment disappears. There

are risks in formulating constitutional rules broader than required by the facts to which they are applied. *Arkansas* v. *Sanders*, 442 U.S. 753, 766 (Burger, Jr., concurring).

The opening and search of "all containers taken from arrestees and containers found in their vehicles" will create a rule far broader than that of *Belton* or *Ross*. The privacy expectation of the innocent accident victim whose car or luggage falls into police custody will be less than that of the *Chadwick* drug smuggler, the *Belton* arrestee, or the *Ross* criminal automobile owner. The carefully hewn parameters of the valid warrantless search of containers will be cast aside before the demands of administrative procedures. *See Wagner* v. *Higgins*, 754 F.2d 186, 190 (6th Cir. 1985).

Professor LaFave, one of the fathers of the "bright line" rules,[19] now laments the over-expansive *Belton*-type rule suggested by the petitioner here as:

> [N]o less than an invitation to subterfuge, for police wishing to search a car but lacking grounds to do so need only await the commission of some minor offense by the driver or other occupant and then arrest before the search.[20]

Indeed, the suggested *Bertine* rule of inventory search of closed containers will permit container searches in the trunk of the vehicle not permitted even under *Belton*, and of containers excluded under the probable cause standard of *Ross*.

The court must be cognizant of the impact of such an inventory exception in other areas of fourth amendment

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[19] LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 S.Ct. Rev. 127, 142.

[20] LaFave and Isreal, *Criminal Procedure*, Vol. 1, 276 (1984).

analysis. The emerging "inevitable discovery" rule of *Nix* v. *Williams*, 467 U.S. 431 (1984) has resulted in approval of otherwise unlawful searches incident to arrest based on the inevitable discovery of the evidence through a routine inventory search. *See, e.g., United States* v. *Andrade*, 784 F.2d 1431 (9th Cir. 1986). This convergence of exceptions to fourth amendment protections has prompted at least one circuit judge to mark "the passing of still another important part of the protection of the Fourth Amendment," and the resulting encouragement of illegal and unconstitutional searches. *Id.* at 1433-34. (Reinhardt, C.J., concurring.)

In *New York* v. *Class*, ___ U.S. ___, 106 S.Ct. 960, 969 (1986), the petitioner, State of New York, argued the convergence of *Opperman, supra*, and *Nix* v. *Williams, supra*, as an alternative theory justifying the police search of a vehicle incident to an arrest. The Court did not reach those issues in its opinion.

More frightening is the fact that federal courts have already been confronted by prosecutorial arguments legitimizing warrantless searches of homes or hotel rooms on the inventory exception rationale. *See United States* v. *Ladson*, 774 F.2d 436 (11th Cir. 1985); *United States* v. *Parr*, 716 F.2d 796 11th Cir. (1983) (fireman protective search for valuables); *United States* v. *Lyons*, 706 F.2d 321 (D.C. Cir. 1983) (hotel room "inventory" after arrest of occupant).

The Court should not strike so deeply at cherished expectations of privacy. There is little justification and no *necessity* for such a sweeping rule. Respondent would suggest a compromise between the conflicting interests based upon the rule of *Robbins* v. *California*, 453 U.S. 420 (1981). The rule would state that:

> A closed piece of luggage or other closed container which is subject to a lawful inventory procedure is

> constitutionally protected by the fourth amendment and shall not be opened *unless* its contents are in plain view or are reasonably believed to be dangerous. Otherwise, it shall be inventoried as a unit.

This "single familiar standard" is capable of general application by police officers engaged in the non-exigent routine caretaking function of a standardized inventory procedure without fostering subterfuge and pretextual police conduct. The individual's reasonable expectations of privacy in his personal effects will be adequately protected while not significantly impacting the legitimate governmental interests in a property inventory. The right to be free from unreasonable searches and seizures should not be reduced to the size of the smallest pearl or gem that one might possess.

CONCLUSION

Under the unique facts of this case, the decision of the Colorado Supreme Court invalidating the inventory search of luggage and closed containers was correct. The judgment of the lower court should be affirmed. The opinion of the Court should explain that the inventory search in this case violated the fourth amendment inasmuch as it was undertaken without consultation with and approval by Steven Lee Bertine and the scope of the inventory went beyond those items which were reasonably believed to be dangerous or were in plain view.

Respectfully submitted,

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